Annual Survey of Massachusetts Law

Volume 1971 Article 20

1-1-1971

Chapter 17: Land Use Law

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CHAPTER 17

Land Use Law

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A. ZONING

§17.1. Amendment procedures: Protests by affected property owners: Constitutional questions. A majority of state zoning enabling acts provide that if a certain percentage of affected property owners protest a proposed amendment to a local zoning ordinance, the municipal legislative body must approve the amendment by a vote greater than the normally required majority.[1] Massachusetts, conforming to the guideline in the Standard Zoning Enabling Act,[2] requires that at least 20 percent of the affected owners sign a written protest. In pertinent part, G.L., c. 40A, §7 provides:

> [I]n case there is filed . . . a written protest against such change, stating the reasons, duly signed by the owners of twenty percent or more of the area of the land proposed to be included in such change, or of the area of the land immediately adjacent, extending three hundred feet therefrom, or of the area of other land within two hundred feet of the land proposed to be included in such change, no such change of any such ordinance shall be adopted except by a unanimous vote of all the members of the city council, whatever its form, if it consists of less than nine members or, if it consists of nine or more members, by a three-fourths vote of all the members thereof. . . .[3]

In *Trumper v. City of Quincy*,[4] the constitutionality of the above statutory provision was challenged. The challenge arose out of the action of the Quincy City Council in approving the rezoning of a certain district over a protest properly filed in accordance with the

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§17.1. [1] Anderson and Rosweig, Planning, Zoning, Subdivision 190, chart no. 3 (1966). See also McQuillan, Municipal Corporations §§25.245, 25.248 (3d ed. 1965); Yokley, Zoning Law and Practice §7-12 (3d ed. 1965); 101 C.J.S. Zoning §§114, 122 (1958). The normally required majority in Massachusetts is two-thirds. G.L., c. 40A, §7.

[2] Standard Zoning Enabling Act §5 (1926). The act was prepared by an advisory committee appointed by Herbert Hoover when he was secretary of commerce.

[3] The provisions of the statute may not be varied by local ordinances or charter provisions, and the voting requirement is based on the full membership of the city council, not just a quorum thereof. Kubik v. Chicopee, 353 Mass. 514, 233 N.E.2d 219 (1968).

[4] 1970 Mass. Adv. Sh. 1455, 264 N.E.2d 689.

statute. Of the nine members on the city council, only six voted for the rezoning, although the three-fourths rule required that seven councilors approve. The action of the city council was invalidated in the Land Court, and thereafter some of the property owners in the district who favored the rezoning intervened in an appeal to the Supreme Judicial Court. Although it was conceded that the challenged statute was applicable to the proposed rezoning and that the statute had not been complied with, the appellants advanced two principal grounds for declaring the statute unconstitutional: (1) it improperly delegates legislative power to private individuals,[5] and (2) it violates the equal protection clause of the Fourteenth Amendment because no provision is made for those who favor a proposed amendment to file a document comparable to the protest. The appellants also contended that the statute was arbitrary, superfluous, unrelated to the general public welfare, and impermissibly vague in defining standards for the protesting landowners and the city council.

None of the appellants' arguments was discussed in any detail by the Supreme Judicial Court. Having noted that legislation similar to the Massachusetts statute exists in many states,[6] the Court referred to a 1960 New Jersey case as support for its reasoning on the constitutional issues.[7] Because the statute left the ultimate decision on zoning changes in the hands of the municipal legislative body, the Court found that the protesters were given no more than the right to petition the government for redress of their grievances. The added leverage given them in exercising their right was held not to be arbitrary or unreasonable.[8] In quickly dismissing the appellants' equal protection argument, the Court simply noted that those favoring a proposed zoning amendment are given ample notice that a protest has been filed and an opportunity to make their views known at the public hearing on the proposed amendment.

Statutes such as the one challenged in *Trumper* are designed primarily to protect property owners from unwanted changes in local zoning ordinances.[9] In many situations, this protection is a desirable

[5] Certain types of so-called consent statutes provide that zoning ordinances may be enacted or amended only with the consent of affected property owners. Because the ultimate decision has been left in the hands of private citizens rather than the municipal legislative body, such statutes have been declared unconstitutional on the ground of improper delegation of legislative authority. Eubank v. Richmond, 226 U.S. 137 (1912); State ex rel. Foster v. Minneapolis, 255 Minn. 249, 97 N.W.2d 273 (1959).

[6] See n.1 *supra*.

[7] Farmer v. Meeker, 63 N.J. Super. 56, 163 A.2d 729 (1960).

[8] "The statute does not prevent the governing body from amending its ordinance. It merely requires a percentage of vote greater than the usual majority where a proper protest has been filed. That the municipality should exercise extra diligence when it is making important changes in the property rights of citizens who object is obvious, and the Legislature has rightly exercised its discretion in predetermining the precise degree of extra diligence those citizens will be guaranteed." 1970 Mass. Adv. Sh. 1455, 1457, 264 N.E.2d 689, 690, quoting from Farmer v. Meeker, 63 N.J. Super.56, 64, 163 A.2d 729, 733 (1960).

[9] See Anderson, American Law of Zoning §4.34 (1968).

goal, for the expectations arising from stable zoning patterns underlie much of the effectiveness of zoning as a means of controlling and directing land use. A word of caution is in order, however, because it has become clear that certain zoning devices can be employed as a means of excluding low- and moderate-income housing from a community. It is virtually certain that procedures which act to bar such housing by increasing the difficulty of passing zoning amendments will be subject to intense constitutional scrutiny in the near future. Outside of such equal protection challenges, however, the landowner protest procedure will remain valid under the *Trumper* decision.

§17.2. Appeals from decisions of the Board of Appeal of Boston: Requirement for an appeal bond. Under the special zoning enabling statute applicable only to the city of Boston,[1] any person wishing to appeal a decision of the Board of Appeal of Boston must file a bond, with sufficient surety, in the Suffolk Superior Court. The bond is to be approved by the court and is to be set at such an amount as will "indemnify and save harmless the person or persons in whose favor the decision [of the board] was rendered from all damages and costs which he or they may sustain in case the decision . . . is affirmed."[2] An appeal bond of $50,000 was set in the case of *Damaskos v. Board of Appeal of Boston*,[3] but when the plaintiffs failed to post the bond, their bill in equity was dismissed by the superior court. On appeal to the Supreme Judicial Court, the plaintiffs contended that the requirement of a bond was an unconstitutional limitation of free access to the courts, deterring those of insubstantial means from prosecuting their rights.[4] Although most cases dealing with this due process issue have arisen in the context of criminal statutes,[5] the plaintiffs argued that financial barriers should also be removed when they inhibit open access to the courts in civil matters. What the plaintiffs were seeking to appeal was the granting of a variance for a 24-unit apartment house to be constructed in a residence district in the area where the plaintiffs lived.

In an opinion by Justice Cutter, the Supreme Judicial Court discussed the constitutional issue, but concluded that the statutory section requiring a bond "should be interpreted in a manner which will avoid [the] various constitutional questions. . . ."[6] This is to be accomplished, according to the Court, by reading the statute as giving the superior court effective discretion in applying the bond requirement to discourage only frivolous and vexatious appeals.

§17.2. [1] Acts of 1956, c. 665.

[2] Id. §11.

[3] 1971 Mass. Adv. Sh. 343, 267 N.E.2d 897.

[4] The plaintiff's appeal was phrased in terms of a due process argument. The bond requirement has already been upheld against the challenge that its applicability only to Boston violates the equal protection clause of the Fourteenth Amendment. Begley v. Board of Appeal of Boston, 349 Mass. 458, 460, 208 N.E.2d 799, 801 (1965). See 1965 Ann. Surv. Mass. Law §§11.10, 14.3.

[5] See cases cited by the Court, 1971 Mass. Adv. Sh. 343, 350, 267 N.E.2d 897, 902.

[6] Id. at 351, 267 N.E.2d at 903.

> So interpreting [the challenged provision], and applying usual equitable principles to the requirement of a bond, frivolous appeals (or appeals by an aggrieved person not seriously harmed by the variance) may be discouraged by a decree ordering a bond with a penal sum sufficient to protect the grantee of the variance fully. On the other hand, where an aggrieved person may be seriously harmed and has a meritorious case, the bond requirement may be so applied as to avoid obstructing proper appeals.[7]

The Court reversed the decree fixing the amount of the bond and remanded the case. Unfortunately, the decision provides no guidance for the judge who must balance the need for open access to the courts against the statutory mandate that the bond be sufficient to indemnify the other party or parties for *all damages and costs* that may be sustained if the appeal does not succeed.

Perhaps the most immediate effect of the *Damaskos* decision will come from the Court's handling of a subsidiary issue in the case: the failure of the Board of Appeal of Boston to provide a record that indicated the grounds for the board's granting of the variance for the apartment complex. "Unless there is substantial expansion of the board's decision, nothing in the decision will indicate that the grant of the variance . . . is not arbitrary and capricious."[8] That the board will henceforth be required to produce a record of facts and subsidiary findings is made even clearer in a companion case to *Damaskos, Playboy of Boston, Inc. v. Board of Appeal of Boston:*

> The record contains no indication, other than the board's decision, of the grounds for granting the variance. We thus have no adequate basis for deciding whether the plaintiff's appeal is meritorious. There is no basis for knowing what harm, if any, will be caused to the plaintiffs if the variance is not set aside, or of other equitable considerations which, in accordance with our decision today in *Damaskos v. Board of Appeal of Boston, ante,* may properly be taken into account in determining what penal sum should be set for any bond to be furnished. . . .[9]

[7] Id. at 351-352, 267 N.E.2d at 903. The Court also noted that an important public benefit is served when aggrieved parties have access to the courts to protest the decisions of local boards of appeal, for the private citizen is thereby helping to ensure that the local boards are conforming with the strict statutory restrictions on granting variances.

[8] Id. at 352, 267 N.E.2d at 904.

[9] Id. at 356, 267 N.E.2d at 905. Because the plaintiff's appeal was the chief obstacle delaying the construction of a 30-story office building, its appeal bond was set at $3 million, a potentially prohibitive figure even for Playboy of Boston, Inc.

There has been a definite trend in the recent decisions of the Supreme Judicial Court toward requiring administrative agencies and boards to produce a clear record to explain and support their decisions. See, e.g., Insurance Rating Board v. Commissioner of Ins., 1971 Mass. Adv. Sh. 401, 268 N.E.2d 144: "The Commissioner's findings are not adequate to enable us to determine (a) whether his order and conclusions are warranted by appropriate subsidiary findings, and (b) whether such subsidiary findings are supported by substantial evidence. . . . He should find expressly those subsidiary facts upon which he relies. He should not leave . . . the courts without the guidance of proper findings. . . ." Id. at 407, 268 N.E.2d at 149.

§17.3. Control over coastal wetlands: Interrelationship between state regulations and local zoning laws. The General Laws, c. 130, §27A provides in part that "[n]o person shall remove, fill or dredge any bank, flat, marsh, meadow or swamp bordering on coastal waters without written notice . . . to the board of selectmen in a town or to the appropriate licensing authority in a city, to the state department of public works, and to the director of marine fisheries." The town of Famouth, under its zoning bylaws, requires that a special permit be obtained from the board of selectmen before anyone may engage in "a) Obstructing, filling, dredging, excavating or changing the course of any stream or tidal river; [or] b) Filling or excavating within any part of any marsh or tidal marsh or in or along the shore of any pond so as to alter the shore line."[1] The plaintiff in *Golden v. Board of Selectmen of Falmouth*[2] owned a tract of land in Falmouth and wished to construct a 24-foot-wide boat channel in the tidal marsh that was part of his property. He filed the required written notice with the director of marine fisheries under G.L., c. 130, §27A, and applied to the Falmouth board of selectmen for a special permit. The director of marine fisheries issued an "order of conditions" authorizing the construction of the channel, but the selectmen later voted to deny the special permit. On a bill in equity brought in superior court, the board's action was annulled. In ordering the board to issue a special permit subject only to the conditions imposed by the director of marine fisheries, the judge concluded that the state had ultimate authority over the regulation of coastal wetlands under the General Laws.[3] The board appealed.

The Supreme Judicial Court first determined that Falmouth's zoning bylaw is a permissible exercise of municipal zoning power.[4] In examining the provisions of G.L., c. 130, §27A, the Court could find no legislative intent to preempt the field in regulating coastal wetlands, except for cases in which the state Department of Public Works is empowered to veto any project which violates G.L., c. 91, §§30, 30A (concerning removal of sand, gravel, and certain natural barriers from beaches and coastal areas). "The Act does not attempt to create a uniform statutory scheme. It establishes minimum State-wide standards leaving local communities free to adopt more stringent controls."[5]

§17.3. [1] Zoning By-Laws of the Town of Falmouth §36 (entitled "Wetlands Regulation").

[2] 1970 Mass. Adv. Sh. 1685, 265 N.E.2d 573.

[3] The superior court's decision focused primarily on the language in G.L., c. 130, §27A, providing that a board of selectmen *may recommend* certain protective measures in connection with a proposal for dredging or filling coastal wetlands. "It is up to the director of marine fisheries to either reject the suggestions of the local body or to adopt them and impose them as conditions." 1970 Mass. Adv. Sh. 1685, 1687 n.2, 265 N.E.2d 573, 575 n.2.

[4] The Court cited MacGibbon v. Board of Appeals of Duxbury, 1970 Mass. Adv. Sh. 81, 255 N.E.2d 347, wherein the Court had held that a zoning bylaw intended to protect the town's natural resources along its coastal areas was expressly authorized by the state zoning enabling act, G.L., c. 40A, §4 (dealing with exceptions). See 1970 Ann. Surv. Mass. Law §§17.2, 26.1.

[5] 1970 Mass. Adv. Sh. 1685, 1691, 265 N.E.2d 573, 577. "The advances thus far made

It was held, therefore, that the board of selectmen had acted properly and within its jurisdiction in denying the plaintiff's request for a special permit.

Golden v. Board of Selectmen of Falmouth represents a laudable step in the direction of greater involvement of local communities in conservation efforts. As the Court pointed out, G.L., c. 130, §27A provides for the active involvement of the Department of Public Works and the director of marine fisheries only in certain situations. If a proposed project did not threaten shellfish or marine fisheries, and if it did not involve the removal of sand, gravel, or certain natural barriers from coastal areas, there might be no state regulation whatsoever. As long as a local community acts reasonably, it should make no difference that its zoning laws go further than the state laws in conserving local natural resources.

§17.4. Zoning boards of appeals and the courts: Extent of appellate jurisdiction. The General Laws, c. 40A, §14[1] requires that "[e]very zoning ordinance or by-law shall provide for a board of appeals, which may be the existing board of appeals under the local building or planning ordinances or by-laws." The jurisdiction of the zoning board of appeals is governed by Section 13 of Chapter 40A, which provides:

> An appeal to the board of appeals established under section fourteen may be taken by any person aggrieved by reason of his inability to obtain a permit from any administrative official *under the provisions of this chapter* . . ., or by any person aggrieved by any order or decision of the inspector of buildings or other administrative official in violation of *any provision of this chapter,* or any ordinance or by-law *adopted thereunder.* [Emphasis added.]

Appeals to the superior court from a decision of the zoning board of appeals are permitted under Section 21 of Chapter 40A.

If a community chooses to maintain a separate board to hear appeals under its building code, there seems to be no question that the decisions of the board are not subject to review by the courts under Section 21 of Chapter 40A.[2] If available at all, judicial review of appeals made under a local building code will usually be controlled by the less liberal provisions of G.L., c. 143, §55.[3] Some confusion

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in this Commonwealth with regard to environmental control would be reversed if local communities were prevented from exercising regulatory authority." Ibid.

§17.4. [1] Chapter 40A of the General Laws is the Massachusetts Zoning Enabling Act.

[2] See Sandberg v. Board of Appeals of Taunton, 349 Mass. 769, 211 N.E.2d 341 (1965): "[T]he judge on the record had no jurisdiction to act. The defendant board of appeals was established under the city's building code. There was no showing that the city had provided for a zoning board of appeals under G.L., c. 40A, §14. Jurisdiction in the Superior Court under §21 is confined to appeals under the Zoning Enabling Act."

[3] Chapter 143 of the General Laws is entitled "Inspection and Regulation of, and Licenses for, Buildings, Elevators and Cinematographs." Section 55 is the only appeal

may arise, however, when a community has chosen to combine either its zoning and building ordinances or its zoning and building boards of appeals—or both. Such a combination may mean that the zoning board of appeals has jurisdiction under the local building code to hear appeals arising under the code, as in a case in which a building permit has been denied. There has been some doubt whether a right to appeal to the superior court under Chapter 40A is available in such a situation, or whether a person aggrieved by the board's disposition is restricted to seeking judicial review under Chapter 143 or perhaps a declaratory judgment under Chapter 231A.[4] The uncertainty has persisted even after several recent decisions by the Supreme Judicial Court concerning appellate jurisdiction under Chapter 40A.[5]

During the 1971 SURVEY year, the Supreme Judicial Court finally laid the confusion to rest by its decision in *P & D Service Co. v. Zoning Board of Appeals of Dedham.*[6] The plaintiff in that case had applied to the building inspector of Dedham for two building permits. The applications were in proper form, and as of the date of application, the proposed project complied with both the building code and the zoning bylaw. The building inspector informed the plaintiff's representative that no building permits could be issued until a "sewer certificate" had been obtained from the Dedham Board of Health. That same day the necessary certificate was obtained, and the permits were issued. Some ten days later, however, the building inspector, at the written request of the town selectmen, informed the plaintiff that the building permits were revoked because the selectmen were concerned about the capacity of the common sewer in the proposed building area to handle another connection. The zoning board of appeals affirmed the revocation, but for reasons unrelated to the question of sewer capacity. Instead, the board relied on the plaintiff's alleged failure to comply with a provision of the state sanitary code.[7] The superior court upheld the board's decision, and the plaintiff appealed to the Supreme Judicial Court under Section 21 of Chapter 40A.

The major portion of the Court's opinion in *P & D Service* is taken up with the issues of sewer capacity, the application of the state sanitary code, and the procedures required by the town of Dedham for obtaining a building permit. Having decided all the foregoing issues in favor of the petitioner, the Court held that the case was not properly

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provision of general applicability, although Sections 10, 70, and 81 also relate to appeals under Chapter 143.

[4] Such doubt was expressed as recently as 1968 in Ryckman, Judicial and Administrative Review in Massachusetts Zoning and Subdivision Cases—Part Three §IX, 53 Mass. L.Q. 129 (1968).

[5] See cases cited in P & D Service Co. v. Zoning Board of Appeals of Dedham, 1971 Mass. Adv. Sh. 385, 392, 268 N.E.2d 153, 158.

[6] 1971 Mass. Adv. Sh. 385, 268 N.E.2d 153.

[7] The zoning board of appeals based its decision on the alleged failure of P & D Service Co. to obtain a "sewer entrance permit" as required under Regulation 2.5 of article XI of the state sanitary code. The Supreme Judicial Court held that this section of the sanitary code was inapplicable to the instant case.

before it and that the zoning board of appeals had lacked jurisdiction to hear the petitioner's appeal. The Court determined that the building inspector had revoked the permits, not under color of any zoning law, but solely for reasons related to procedures under Dedham's building code. As a consequence, at the time of the original appeal to the zoning board, petitioner was not a person aggrieved by an order or decision made in violation of "any provision of [Chapter 40A], or any ordinance or by-law adopted thereunder." Because the zoning board had lacked jurisdiction under Section 13 of Chapter 40A, the superior court also lacked jurisdiction, for it can hear appeals under Section 21 of Chapter 40A only if the appeals are from decisions under zoning ordinances or by-laws.[8] After thus resolving the jurisdictional question, the Supreme Judicial Court framed its decision to afford the petitioner an opportunity to amend its bill in equity in the superior court by substituting a bill for declaratory relief under Chapter 231A.

The *P & D Service* case has clarified the basis of jurisdiction of zoning boards of appeal under Section 13, and of the courts under Section 21, of Chapter 40A: hereafter, any proceedings under these sections must relate solely to zoning ordinances or bylaws. Difficulties will remain, however, whenever a community's zoning and building ordinances are mixed or combined. Distinctions will have to be made on the basis of the purpose and function underlying a particular provision—a task which may sometimes prove difficult. If the courts were to assume a flexible attitude in close cases, perhaps by allowing a party to amend to the proper remedy, meritorious appeals need not be stifled. Clearly, however, reliance should not be placed on such flexibility; the aggrieved party must carefully analyze the nature of the right he feels has been infringed or denied before deciding on the proper remedy.

§17.5. Statutory procedure: Notice to abutters of the abutters. The General Laws, c. 40A, §17 governs the notice that a zoning board of appeals must give before holding a hearing on "any appeal or other matter referred to it or any petition for a variance." Prior to 1971, in addition to notice by publication, the board was required to send notice by mail "to the petitioner and to the owners of all property deemed by the board to be affected thereby, as they appear on the most recent local tax list. . . ." Chapter 569 of the Acts of 1971 amended the requirement for notice by mail, which now must be sent to

> the petitioner and to the owners of all property deemed by the board to be affected thereby including the abutters and the owners of land next adjoining the land of the abutters, notwithstanding

[8] Rice v. Board of Appeals of Dennis, 342 Mass. 499, 501-502, 174 N.E.2d 355, 357 (1961).

that the abutting land or the next adjoining land is located in another city or town, as they appear on the most recent tax lists, and to the planning board of the city or town, and, if pertinent, of the adjoining city or town.

Perhaps the first aspect of the amendment which should be noted is the fact that it is directive, i.e., it leaves no discretion in the board to omit notice by mail to any abutter or to any abutter of the abutter of land which is to be the subject of a hearing. As a consequence, this provision is jurisdictional, and failure to give the minimum required notice will invalidate any action taken at the hearing.

The amendment is an improvement over the earlier rule, but some curious results are possible. For example, in some cases the abutter to the abutter may be only a hundred feet or so from the property which is the subject of the hearing, while in other cases he may be more than a mile away. As a result, landowners very close to the subject property may not receive notice simply because they are more than two "ownership parcels" of land away. This situation can be rectified if the board is conscientious in executing the discretionary provision for notice to "the owners of all property deemed by the board to be affected." It would seem, however, that a standard based on a distance from the subject property might be better suited for ensuring that those most affected are informed of the pending hearing. The problem of identifying all property owners within one or two thousand feet of a site must be recognized, but if the mechanical means can be found to do so, a more comprehensive notice would be achieved.

The amended notice requirement still carries the provision that the landowners to be notified are to be determined with reference to the most recent tax list(s). This procedure makes the notification somewhat simpler than would a reference to the registry of deeds, although the latter would be more accurate. One might also question whether the person noted on a tax list is the sole party who should receive formal notice because of his ties with particular property. For instance, a given district may include several tenants with long-term leases under which the lessor is responsible for payment of property taxes. The lessor may have relatively little interest in the outcome of the hearing before the board, while the long-term lessee may be substantially affected, yet receive no formal notice.

Although some provisions of the notice procedure could stand further amendment to ensure more effective notice, the 1971 amendment is clearly a positive step. It represents the first clear indication in the Zoning Enabling Act that municipal boundary lines are not to be the physical limits of consideration in hearings under the act. This legislative policy, it can be assumed, will henceforth require that the effect of variances and special permits be considered, under the particular limitation of "abutter of the abutter," beyond the geographical limits of the municipality itself.

B. Subdivision Control

§17.6. Effect of zoning changes on previously submitted development plans. In order to protect a property owner during the planning stage of a development project, G.L., c. 40A, §7A provides for a "breathing period" during which the property owner will not be affected by changes in local zoning ordinances or bylaws. To qualify for this protection, he must have submitted his preliminary or definitive development plan for the first time prior to the date on which the zoning change was adopted.[1] If he does so, and his plan is later approved, the provisions of the zoning ordinance or bylaw that were in effect at the time the plan was submitted will govern the land shown on the approved definitive plan "for a period of seven years from the date of endorsement of such approval. . . ."[2]

When Section 7A was first enacted in 1957, it provided for a grace period of three years from the date of plan approval, but only if *approval* preceded the zoning change.[3] A 1961 amendment extended the statutory period to five years and made the protection of Section 7A available if the *first submission* of the plan preceded the zoning change.[4] Finally, in 1965, the period was extended to seven years, to run from the date the approved plan is endorsed, not from the date of plan approval itself.[5] As might have been expected, some property owners sought to have the 1961 and 1965 amendments applied retroactively. In *Building Inspector of Acton v. Board of Appeals of Action,*[6] the three-year period available to the landowner had already expired before the 1961 amendment was enacted. The Supreme Judicial Court held that the amendment could not be applied retroactively because substantive property rights would be affected if it were. The retroactivity issue was raised in connection with the 1965 amendment in *Doliner v. Plannning Board of Millis.*[7] The subdivision plan at issue in that case was first submitted to the local planning board in April 1959, one month after the town meeting had adopted a zoning amendment affecting the petitioner's use of his land, but two months before the attorney general approved the new zoning bylaw. Disapproval of the plan also preceded the attorney general's action on the bylaw. The Supreme Judicial Court refused to apply retroactively either the 1961 or the 1965 statutes.[8] In its opinion, the Court con-

§17.6. [1] The standards for a preliminary plan are contained in G.L., c. 41, §81S. The definitive plan is either that plan which evolves from the preliminary plan or, in the absence of a preliminary plan, the one that is submitted in accordance with the local subdivision control law.

[2] If the preliminary or definitive plan is disapproved, but later is either amended and approved or approved on appeal under the local subdivision control law, the protection of Section 7A will still apply if the original submission was made before the zoning change was adopted.

[3] Section 7A was originally added to Chapter 40A by the Acts of 1957, c. 297.

[4] Acts of 1961, c. 435, §2, effective August 3, 1961.

[5] Acts of 1965, c. 366, §1, effective July 26, 1965.

[6] 348 Mass. 453, 204 N.E.2d 296 (1964), noted in 1965 Ann. Surv. Mass. Law §14.2.

[7] 349 Mass. 691, 212 N.E.2d 460 (1965), noted in 1966 Ann. Surv. Mass. Law §15.20.

[8] The 1961 amendment to Section 7A was enacted during the time between the oral

cluded that retroactive application would affect substantively "the positions of Doliner, the town, and Doliner's neighbors as they respectively stood at the time Doliner filed his plan."[9]

During the 1971 SURVEY year, in *Vazza v. Board of Appeals of Brockton,*[10] the retroactivity issue arose once again. The land in question was zoned for "single-family dwellings, two-family dwellings, apartment or tenement houses" when, in December 1960, the planning board of Brockton approved the definitive subdivision plan submitted by the landowner. In August 1962, however, Brockton's zoning ordinance was amended to limit the subject land to use for single-family and two-family dwellings. Nothing further occurred until November 1967, when the petitioner in this case entered into a written agreement with the landowner to purchase 12 of the lots shown on the approved subdivision plan. Their agreement was made contingent on the petitioner's being able to obtain building permits to construct four multifamily apartment houses on portions of the land to be purchased. The permits were properly applied for, but were denied by the building inspector on the ground that the land in question could not be used for dwellings intended to house more than two families. The building inspector's denial of the permits was affirmed by the zoning board of appeals, and petitioner's subsequent bill of complaint was dismissed in the superior court. He appealed to the Supreme Judicial Court under G.L., c. 40A, §21.[11]

What distinguished the *Vazza* case from the *Acton* and *Doliner* cases was the fact that the three-year grace period for an approved plan under the 1957 statute had not yet expired when the 1961 amendment to Section 7A extended the period to five years. Moreover, if the 1961 amendment were held retroactive under that fact situation, the five-year period would not have expired when the 1965 amendment extended the period to seven years. Finally, if the 1965 amendment were held retroactive in this situation, the application for building permits in November 1967 would have come within the protected period, and the building inspector's denial would have been unlawful. This attempt at "leap-frogging" failed. Petitioner's chief argument was based on the following language in the 1965 amendment: "The

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argument and the decision in the first case of Doliner v. Planning Board of Millis, 343 Mass. 1, 175 N.E.2d 919 (1961). Upon remand for further consideration and a public hearing, the planning board in May 1962 again disapproved the plaintiff's subdivision plan. The plaintiff appealed to the superior court that same month, but it was not until January 1965 that the trial judge reported the case to the Supreme Judicial Court without having rendered a decision. By the time oral arguments were heard on the second appeal in Doliner v. Planning Board of Millis, the 1965 amendment to Section 7A had become effective.

[9] 349 Mass. 691, 697, 212 N.E.2d 460, 464 (1961).

[10] 1971 Mass. Adv. Sh. 575, 269 N.E.2d 270.

[11] Because the building inspector's denial of the permits was based on an alleged violation of the Brockton zoning law, the zoning board of appeals had jurisdiction of the appeal under G.L., c. 40A, §13, and the courts had jurisdiction under c. 40A, §21. Compare this sittuation with the jurisdictional deficiency in P & D Service Co. v. Zoning Board of Appeals of Dedham, discussed in §17.4. *supra.*

provisions of this act shall apply to plans *submitted* to planning boards prior to its effective date."[12] (Emphasis added.) The Supreme Judicial Court held that the statutory language was intended to save only those plans that had been submitted and were awaiting consideration and approval at the time the amendment became effective. Presumably, the question of retroactivity for Section 7A has finally been laid to rest. By implication at least, the Court has also answered the question of retroactivity for zoning statutes in general, provided those statutes do not carry a clear legislative mandate to the contrary.[13]

Another interesting case relating to Section 7A was decided during the 1971 SURVEY year. Although *Nyquist v. Board of Appeals of Acton*[14] involved a development plan that did not require approval under the subdivision control law,[15] the case illustrates how Section 7A interrelates with other portions of Chapter 40A. In *Nyquist,* the owners of a particular situs submitted to the Acton planning board a plan for developing the situs into a shopping center. When the plan was submitted in December 1968, the situs was in an Industrial I-1 zone, in which retail uses were permitted. Approximately a month and a half later, however, the planning board published the first notice of a hearing on a proposal to rezone an area including the situs from Industrial I-1 to Industrial I-2. Retail uses would not have been permitted in the I-2 zone. On March 14, 1969, some three weeks after the hearing was held, a prospective purchaser of the situs applied to the Acton building inspector for a permit to construct a department store and associated parking facilities on the situs. Although the building permit was finally granted on May 28, 1969, by that time the town meeting had voted to rezone the situs to I-2. The plaintiffs, who owned land near the situs, sought to have the zoning board of appeals revoke the permit, but the board found that the permit had been properly issued. Plaintiffs were also unsuccessful on appeal to the superior court under G.L., c. 40A, §21, and so carried their appeal to the Supreme Judicial Court.

Plaintiffs argued, in effect, that the issuance of building permits for nonsubdivision plans under Section 7A should be controlled by G.L., c. 40A, §11, which provides in part that no amendment in a town's zoning bylaw shall affect "any permit issued or any building or structure lawfully begun before notice of hearing . . . has first

[12] Acts of 1965, c. 366, §2.

[13] "At least in the absence of very clear statutory language, we do not apply legislation retroactively in such a manner as to affect substantive rights." 1971 Mass. Adv. Sh. 575, 578, 269 N.E.2d 270, 273, quoting from Building Inspector of Acton v. Board of Appeals of Acton, 348 Mass. 453, 456, 204 N.E.2d 296, 299 (1964).

[14] 1971 Mass. Adv. Sh. 803, 269 N.E.2d 654.

[15] G.L., c. 40A, §7A consists of two paragraphs; the first relates to subdivision plans, and the second provides that "[w]hen a plan [not requiring approval under the subdivision control law] has been submitted to a planning board . . . , the use of the land shown on such plan shall be governed by applicable provisions of the zoning ordinance or by-law in effect at the time of the submission of such plan . . . for a period of three years from the date of endorsement by the planning board that approval under the subdivision control law is not required. . . ."

been given."[16] The permit for the department store and parking facilities was issued after both the first notice of hearing and the actual vote of the town meeting to adopt the zoning change. The Court, however, summarily rejected the plaintiffs' reasoning and held that the three-year grace period for nonsubdivision plans is part and parcel of the broad protection afforded by Section 7A and is not controlled by Section 11. In summarizing the protective pattern in Chapter 40A, the Court stated:

> . . . G.L. c. 40A, §5, protects existing buildings and existing uses from zoning changes. It is also apparent that G.L. c. 40A, §11, protects a developer during the permit and construction phases from zoning changes. In order for §7A to be meaningful, it must be held to protect a developer from zoning changes during the planning stage. Otherwise, the broad protection extended by §7A to undeveloped land would become meaningless. Such a result cannot have been intended by the Legislature.[17]

§17.7. Subdivision plans: Constructive approval: Attempts to rescind approval. Once a landowner properly submits a subdivision plan, he is afforded various statutory forms of protection. Subject to the provisions of G.L., c. 40A, §7A, if the plan is later approved, it will be protected from changes in local zoning ordinances or bylaws for a period of seven years.[1] A primary concern of the landowner/developer is that undue delays by the planning board in acting on his subdivision plan will result in loss of financing or added costs of financing, or may even result in the scuttling of the entire plan. His protection against such undue delays in provided by G.L., c. 41, §81U:

> Failure of the planning board either to take final action or to file with the city or town clerk a certificate of such action regarding a plan submitted by an applicant within sixty days after such submission, or such further time as may be agreed upon at the written request of the applicant, shall be deemed to be an approval thereof.

If this "constructive approval" is not challenged within the statutory appeal period,[2] or if on appeal the approval is upheld,[3] the applicant is entitled to a certificate which is recorded in the registry of deeds along with the subdivision plan.[4]

[16] It was the plaintiffs' position that once a building permit had been issued, its protection from the efforts of a zoning change could be distinguished from the protection afforded to the use of the land under G.L., c. 40A, §7A.

[17] 1971 Mass. Adv. Sh. 803, 806, 269 N.E.2d 654, 656.

§17.7. [1] See the discussion in §17.6 *supra*.

[2] G.L., c. 41, §81V provides only that notice of an appeal must be filed in the superior court within 20 days. Presumably, the 20-day period begins to run 60 days after a subdivision plan has been submitted to the planning board.

[3] The appeal would be made to the "superior court sitting in equity for the county in which the land concerned is situated. . . ." G.L., c. 41, §81BB.

[4] The certificate is issued in accordance with G.L., c. 41, §81V; the recording of the

In *Stoner v. Planning Board of Agawam*,[5] plaintiffs were the purchasers and the second mortgagee of a certain parcel of land. The corporation from which the land was purchased had previously obtained approval of a subdivision plan for the property, but the planning board had failed to file the certificate of its approval within the statutory 60-day period. While conducting a title search prior to the scheduled closing, an attorney for the plaintiffs discovered that the earlier approval had not been recorded in the registry of deeds. Because more than six months had elapsed since the approval, the attorney advised the plaintiffs that the approval would have to be updated by the planning board before recording would be possible.[6] A duplicate of the original plan was thereafter stamped with the approval of the board, dated by the board as of its second vote of approval, and properly recorded by the attorney. More than a year later, however, apparently before any actual development of the situs had begun, the planning board voted to rescind its approval. The board acted under G.L., c. 41, §81W: "A planning board . . . shall have power to modify, amend or rescind its approval of a plan of a subdivision, or to require a change in a plan as a condition of its retaining the status of an approved plan."

None of the plaintiffs assented to the rescission. They brought an appeal in the superior court and obtained a final decree upholding the validity of the subdivision plan and annulling the board's rescission. The Supreme Judicial Court affirmed, holding that the plaintiffs were entitled to the protection of G.L., c. 41, §81W, which contains the following limitation on the power of a planning board to rescind its plan approval:

> No modification, amendment or rescission of the approval of a plan of a subdivision or change in such plan shall affect the lots in such subdivision which have been sold or mortgaged in good faith and for a valuable consideration subsequent to the approval of the plan, or any rights appurtenant thereto, without the consent of the owner of such lots, and of the holder of the mortgage or mortgages, if any, thereon.

The Court concluded that the protection of Section 81W entitled the plaintiffs to a certificate stating that the constructive approval resulting from the board's inaction had become final.[7] It was also deter-

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plan and certificate is governed by G.L., c. 41, §81X.

[5] 1971 Mass. Adv. Sh. 191, 266 N.E.2d 891.

[6] G.L., c. 41, §81X, provides in part: "No register of deeds shall record any plan . . . unless, in case of plans approved, the endorsement or certificate is dated within six months of the date of the recording, or there is also endorsed thereon or recorded therewith and referred to thereon a certificate of the planning board or city or town clerk, dated within thirty days of the recording, that the approval has not been modified, amended or rescinded, nor the plan changed."

[7] " 'The intention of relevant sections of the Subdivision Control Law is to set up an orderly procedure for definitive action within stated times, and for notice of that action in offices of record within stated times, so that all concerned may rely upon

mined that plaintiffs need not have gone back to the board for an updating of the plan approval. The Court simply stated that "[t]he portion of §81X . . . relating to an endorsement of approval 'dated within six months of the date of the recording' or a certificate 'dated within thirty days of the recording . . .' does not apply to plans which have been 'constructively' approved."[8]

In an interesting dictum, the Supreme Judicial Court noted that the planning board's vote of rescission did not by its terms expressly purport to rescind the constructive approval which resulted from its failure to comply with the statute, "assuming the latter type of approval is subject to rescission."[9] An argument can be made that constructive approval is *not* subject to rescission. Section 81W gives a planning board the power "to modify, amend or rescind *its* approval. . . ." (Emphasis added.) Where the approval attaches by operation of law, as where the board fails to file the certificate of its action with the town clerk within the 60-day period, it seems that the board had never given *its* approval in the statutory sense.

§17.8. Planning board: Implied power to require performance bonds. When a developer seeks approval for a subdivision plan, it is the local planning board that must insure that the area to be subdivided is properly improved.[1] One way to provide such assurance is to require the completion or substantial completion of all necessary improvements before the subdivision plan is approved and construction of buildings is permitted to begin. Alternatively, the board could approve the plan and permit development to proceed after receiving some assurance that the improvements specified in the plan would be completed to the satisfaction of the board.[2] In either case, the goal of the planning board is to avoid having the municipality inherit "premature subdivisions and residential areas devoid of paved streets, storm and sanitary sewers, and water supply structures, or premature subdivisions with paved streets and other structures subject to uncollectable special assessments."[3]

The use of performance bonds has become an integral feature of many private construction contracts, and it is not surprising that

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recorded action or the absence thereof within such times.' " 1971 Mass. Adv. Sh. 191, 195-196, 266 N.E.2d 891, 895, quoting Board of Selectmen of Pembroke v. R & P Realty Corp., 348 Mass. 120, 125, 202 N.E.2d 409, 412 (1964). As the Supreme Judicial Court noted, the factual pattern in the Stoner case is very similar to that in the Pembroke case.

[8] 1971 Mass. Adv. Sh. 191, 195, 266 N.E.2d 891, 894.

[9] Id. at 196, 266 N.E.2d at 895.

§17.8. [1] The planning board's responsibility is set forth in part in G.L., c. 41, §81U.

[2] In one Massachusetts case, the planning board received the developer's contractual promise to install certain facilities, but the municipality had to go through litigation to secure the completion of the facilities. Stoneham v. Savelo, 341 Mass. 456, 170 N.E.2d 417 (1960).

[3] Yearwood, Accepted Controls of Land Subdivisions, 45 J. Urban Law 217, 244 (1967), quoting from American Society of Planning Officials, Performance Bonds for the Installation of Subdivision Improvements, Planning Advisory Service Report No. 48 (1953).

governmental units have embraced the concept of performance bonding to guarantee the completion of necessary improvements when a subdivision developer fails to perform. Massachusetts has followed the typical pattern and has provided statutory authority in planning boards to require a proper bond.[4] G.L., c. 41, §81U, provides in part as follows:

> Before endorsement of its approval of a plan, a planning board shall require that the construction of ways and the installation of municipal services be secured by one, or in part by one and in part by the other, of the [following] methods . . . :
>
> (1) By a proper bond or a deposit of money or negotiable securities. . . .
>
> (2) By a covenant, executed and duly recorded by the owner of record, running with the land, whereby such ways and services shall be provided to serve any lot before such lot may be built upon or conveyed, other than by mortgage deed. . . .

As is the case in other states, the express language of the Massachusetts statute covers bonding only for construction of roadways and municipal services.

In *United Reis Homes, Inc. v. Planning Board of Natick,*[5] the Supreme Judicial Court has taken a major step in extending by judicial action the power of local planning boards to require performance bonds. The work to be bonded in that case did not come within the scope of G.L., c. 41, §81U; it involved various measures designated by the local board of health as necessary to provide proper sanitary drainage for the proposed subdivision area.[6] The plaintiffs in *United Reis* contended that the planning board had exceeded its authority in making its approval of the subdivision plan conditional upon compliance with the requirements set out by the board of health, including the requirement for a performance bond. Plaintiffs' argument was rejected by the Supreme Judicial Court. In an opinion by Justice Braucher, the Court looked to the legislative statement of purpose in the state's subdivision control law, which provides in part: "It is the intent of the subdivision control law that any subdivision plan filed with the planning board shall receive the approval of such board if said plan conforms to the recommendation of the board of health and

[4] See, e.g., Okla. Stat. Ann. tit. 11, §1425 (1959): "In lieu of the completion of such improvements and utilities prior to the final approval of the plat, the commission may accept an adequate bond satisfactory to the commission, with surety, to secure to the municipality the actual construction and installation of such improvements or utilities. . . ."

[5] 1971 Mass. Adv. Sh. 981, 270 N.E.2d 402.

[6] Part of the subdivision tract was in and adjacent to a large swamp area, and a brook ran through the tract for approximately 1500 feet. The director of public health in Natick felt that the open brook in an inhabited area would become a "natural catchall" and a public health problem with pockets of stagnant water providing breeding places for vermin and mosquitoes. As a consequence, the board of health ordered the developer to pipe the brook underground through the tract and to fill in certain lots with gravel to improve drainage.

to the reasonable rules and regulations of the planning board. . . ."[7] As to the performance bond, the Court simply reasoned that since the board of health had the power, acting through the planning board, to withhold plan approval until the drainage work was actually completed, it had the implied discretion to allow the work to proceed under reasonable terms designed to insure satisfactory completion. No direct authority was cited by the Court for this proposition. In fact, the only authority referred to by the Court reveals, upon close examination, that there is apparently no other jurisdiction that has permitted a performance bond to be required in situations not expressly mentioned in the applicable statute.[8]

It is submitted, however, that the Supreme Judicial Court's decision in *United Reis* is both proper and sensible, and it is likely that the decision will provide a precedent for other jurisdictions. Presumably, if given the choice, most developers would prefer to seek a performance bond rather than expend large amounts of capital in completing all improvements prior to plan approval. The bonding companies, in making their own business judgments, will assist the municipalities by weeding out those developers whose business history makes them poor risks; yet any developer may still establish his reliability by making all required improvements as the condition for receiving plan approval. In either case, the municipality and those who purchase from the developer will have the maximum assurance that necessary improvements will indeed be made.

§17.9. Planning board approval: Effect on other municipal agencies. The plaintiffs in *Garabedian v. Water and Sewerage Board of Medfield*[1] sought a writ of mandamus to complel the defendant board to supply water to their subdivision. The plan for the subdivision had been approved by the Medfield planning board, subject to the installation by plaintiffs of 6-inch water mains in all the private ways shown on the plan. Some time after the planning board's approval, the chairman of the water board learned "by chance" about the subdivision plan. The water board thereupon notified both the plaintiffs and the planning board that 12-inch water mains would be required in certain of the private ways shown on the subdivision plan. Consulting engineers had recommended the use of 12-inch mains, and the water board insisted that no water would be supplied until the mains had been installed.

The issue before the Supreme Judicial Court was whether the prior approval of the planning board was binding on the water board. In holding that it was not, the Court relied on its decision in *Rounds v. Water and Sewer Commissioners of Wilmington.*[2] That case also involved the refusal of the water board to supply water to a subdivision

[7] G.L., c. 41, §81M.
[8] The Court cited Yearwood, n.3 *supra.*

§17.9. [1] 1971 Mass. Adv. Sh. 743, 269 N.E.2d 275.
[2] 347 Mass. 40, 196 N.E.2d 209 (1964), discussed in 1964 Ann. Surv. Mass. Law §14.16.

until certain piping requirements had been met, but both the developer and the planning board had notice of the piping requirements before the planning board met to approve the subdivision plan. The Court in *Garabedian* nonetheless found the *Rounds* case "dispositive," citing the earlier case's holding that "[t]he water board's action is not controlled by the action of the planning board, for that board cannot speak for and bind other agencies of the town in matters as to which such agencies have independent responsibility."[3]

The Court also seems to have been influenced in the instant case by the fact that the rules and regulations of the Medfield planning board clearly called upon the developer and the planning board to ascertain the requirements of the water board before proceeding with final approval of any subdivision plan. The planning board disregarded its own rules by failing to consult with the water board.

[3] Id. at 43, 196 N.E.2d at 212.